

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'B' PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S.VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.579 to 582/PUN/2018

निर्धारण वर्ष / Assessment Years : 2010-11 to 2013-14

Shri Ganpati Zilla Krishi
Audyogik Sar Seva Sahakari
Society Ltd.,
Plot No.350, Vasant Market
Yard, Dist. Sangli
PAN : AAAAS3624B

ITO, Ward 1(3),
Sangli

Vs.

(Appellant)

(Respondent)

Appellant by
Respondent by

Shri M.K. Kulkarni
Shri Deepak Garg

Date of hearing 18-05-2021
Date of pronouncement 24-05-2021

आदेश / ORDER

These four appeals by the assessee arise out of two orders passed by the CIT(A)-1, Kolhapur on 14-09-2017 and 09-02-2017, first in relation to the assessment years 2010-11 & 2011-12 and second in relation to assessment years 2012-13 & 2013-14. Since common issue is raised in these appeals, we, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

2. The assessee is a co-operative society engaged in the business of manufacture and sale of sugar and its by-products. All the appeals rotate around the confirmation of addition on account of Excessive cane Price paid to the Members/Non-Members.

3. We have heard both the sides through Virtual Court and gone through the relevant material on record. It is seen that similar issue came up for consideration before the Tribunal in a batch of 75 appeals led by Manganga Sahakari Sakhar Karkhana Ltd. Vs. ACIT in ITA No.344/PUN/2017 and others. Vide order dated 01-10-2019, the Tribunal held, on this issue, as under :

“4. A common issue involved in almost all the appeals is against the addition made by the Assessing Officer (AO) towards of excessive sugarcane price paid to members as well as non-members of the respective assessees. The facts common to almost all the appeals are that the assessee are engaged in the business of manufacturing of white sugar. During the course of assessment proceedings, the AO observed that the assessee paid excessive cane price, over and above the Fair and remunerative price (FRP) fixed by the Government, to its members as well as non-members. On being called upon to justify such deduction, the assessee gave certain explanation by submitting that such payment was solely and exclusively in connection with the business and the entire amount was deductible u/s.37(1) of the Income-tax Act, 1961 (hereinafter also called ‘the Act’). Relying on the judgment of Hon’ble Supreme Court in the case of *DCIT Vs. Shri Satpuda Tapi Parisar S.S.K. Ltd. and others (2010) 326 ITR 402*, the AO opined that the excessive price paid was in the nature of ‘distribution of profits’ and hence not deductible. This is how, he computed the excessive cane price paid both to the members and non-members and made addition for the said sum. The Id. CIT(A) in some cases deleted the addition, fully or partly, whilst in others the addition got sustained. This led to filing of the cross appeals both by the assessee as well as the Revenue before the Tribunal.

5. We have heard both the sides and gone through the relevant material on record. There is *consensus ad idem* between the rival parties that the issue of payment of excessive price on purchase of sugarcane by the assessee is no more *res integra* in view of the recent judgment of Hon'ble Supreme Court in *CIT Vs Tasgaon SSK Ltd. (2019) 412 ITR 420 (SC)*. The Hon'ble Apex Court, vide its judgment dated 05-03-2019, has elaborately dealt with this issue. It recorded the factual matrix that the assessee in that case purchased and crushed sugarcane and paid price for the purchase during crushing seasons 1996-97 and 1997-98, firstly, at the time of purchase of sugarcane and then, later, as per the Mantri Committee advice. It further noted that the production of sugar is covered by the Essential Commodities Act, 1955 and the Government issued Sugar Cane (Control) Order, 1966, which deals with all aspects of production of sugarcane and sales thereof including the price to be paid to the cane growers. Clause 3 of the Sugar Cane (Control) Order, 1966 authorizes the Government to fix minimum sugarcane price. In addition, the additional sugarcane price is also payable as per clause 5A of the Control Order, 1966. The AO in that case concluded that the difference between the price paid as per clause 3 of the Control Order, 1966 determined by the Central Government and the price determined by the State Government under clause 5A of the Control Order, 1966, was in the nature of 'distribution of profits' and hence not deductible as expenditure. He, therefore, made an addition for such sum paid to members as well as non-members. When the matter finally came up before the Hon'ble Apex Court, it noted that clause 5A was inserted in the year 1974 on the basis of the recommendations made by the Bhargava Commission, which recommended payment of additional price at the end of the season on 50:50 profit sharing basis between the growers and factories, to be worked out in accordance with the Second Schedule to the Control Order, 1966. Their Lordships noted that at the time when additional purchase price is determined/fixed under clause 5A, the accounts are settled and the particulars are provided by the concerned Co-operative Society as to what will be the expenditure and what will be the profit etc. Considering the fact that Statutory Minimum Price (SMP), determined under clause 3 of the Control Order, 1966, which is paid at the beginning of the season, is deductible in the entirety and the difference between SMP determined under clause 3 and SAP/additional purchase price determined under clause 5A, has an element of distribution of profit which cannot be allowed as deduction, the Hon'ble Supreme Court remitted the matter to the file of the AO for considering the modalities and manner in which SAP/additional purchase price/final price is decided. He has been directed to carry out an exercise of considering accounts/balance sheet and the material supplied to the State Government for the purpose of deciding/fixing the

final price/additional purchase price/SAP under clause 5A of the Control Order, 1966 and thereafter determine as to what amount would form part of the distribution of profit and the other as deductible expenditure. The relevant findings of the Hon'ble Apex Court are reproduced as under:-

“9.4. Therefore, to the extent of the component of profit which will be a part of the final determination of SAP and/or the final price/additional purchase price fixed under Clause 5A would certainly be and/or said to be an appropriation of profit. However, at the same time, the entire/whole amount of difference between the SMP and the SAP per se cannot be said to be an appropriation of profit. As observed hereinabove, only that part/component of profit, while determining the final price worked out/SAP/additional purchase price would be and/or can be said to be an appropriation of profit and for that an exercise is to be done by the assessing officer by calling upon the assessee to produce the statement of accounts, balance sheet and the material supplied to the State Government for the purpose of deciding/fixing the final price/additional purchase price/SAP under Clause 5A of the Control Order, 1966. Merely because the higher price is paid to both, members and non-members, qua the members, still the question would remain with respect to the distribution of profit/sharing of the profit. So far as the non-members are concerned, the same can be dealt with and/or considered applying Section 40A (2) of the Act, i.e., the assessing officer on the material on record has to determine whether the amount paid is excessive or unreasonable or not.....”

9.5 Therefore, the assessing officer will have to take into account the manner in which the business works, the modalities and manner in which SAP/additional purchase price/final price are decided and to determine what amount would form part of the profit and after undertaking such an exercise whatever is the profit component is to be considered as sharing of profit/distribution of profit and the rest of the amount is to be considered as deductible as expenditure.”

6. Both the sides are unanimously agreeable that the extant issue of deduction for payment of excessive price for purchase of sugarcane, raised in most of the appeals under consideration, is squarely covered by the aforesaid judgment of the Hon'ble Supreme Court. Respectfully following the precedent, we set-aside the impugned orders on this score and remit the matter to the file of the respective A.Os. for deciding it afresh as per law in consonance with the articulation of law by the

Hon'ble Supreme Court in the aforementioned judgment. The AO would allow deduction for the price paid under clause 3 of the Sugar Cane (Control) Order, 1966 and then determine the component of distribution of profit embedded in the price paid under clause 5A, by considering the statement of accounts, balance sheet and other relevant material supplied to the State Government for the purpose of deciding/fixing the final price/additional purchase price/SAP under this clause. The amount relatable to the profit component or sharing of profit/distribution of profit paid by the assessee, which would be appropriation of income, will not be allowed as deduction, while the remaining amount, being a charge against the income, will be considered as deductible expenditure. At this stage, it is made clear that the distribution of profits can only be *qua* the payments made to the members. In so far as the non-members are concerned, the case will be considered afresh by the AO by applying the provisions of section 40A(2) of the Act, as has been held by the Hon'ble Supreme Court *supra*. Needless to say, the assessee will be allowed a reasonable opportunity of hearing by the AO in such fresh determination of the issue.

4. Since the facts and circumstances of the instant appeals are *mutatis mutandis* similar to those already considered and decided by the Tribunal in the above batch of appeals, in the given circumstances and following the precedent, we set-aside the impugned orders and remit the matter to the file of the AO for deciding the controversy in conformity with the view taken by the Tribunal as extracted above.

5. The contention of Ld. AR that a Review petition has been filed before the Hon'ble Supreme Court against the judgment in the case of *CIT Vs Tasgaon SSK Ltd. (2019) 412 ITR 420 (SC)* which is still pending and hence the decision thereon should be awaited, is of no consequence. Hundreds of orders have been passed by the

Tribunal on this issue following the final judgment of the Hon'ble Supreme Court in the case of *CIT Vs Tasgaon SSK Ltd. (supra)*. Mere filing of Review petition does not obliterate the *ratio* laid down in the judgment under review. It is only when an order on review is passed that the *ratio* can undergo change subject to the outcome of the review order. Till then, the *ratio* of the decision operates with force and remains binding on all the subordinate courts in the country. Since the issue under consideration is admittedly fully and directly covered by the judgment of the Hon'ble Supreme Court in the case of *CIT Vs Tasgaon SSK Ltd. (supra)*, we are disinclined to accept the argument of the Id. AR.

6. In the result, all the appeals are allowed for statistical purposes.

Order pronounced in the Open Court on 24th May, 2021.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 24th May, 2021
GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-1, Kolhapur
4. The Pr.CIT-1, Kolhapur
5. DR 'B', ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	18-05-2021	Sr.PS
2.	Draft placed before author	18-05-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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